

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CRIMINAL ACTION NO. 5:14-CR-00047-KDB-DCK-3**

UNITED STATES OF AMERICA,

v.

GREGORY ALLEN BARLOW,

Defendant.

ORDER

THIS MATTER is before the Court on Defendant Gregory Allen Barlow's second *pro se* motion for compassionate release. (Doc. No. 175). Having carefully reviewed the Defendant's motion, exhibits, and all other relevant portions of the record, the Court will deny the motion without prejudice to a renewed motion properly supported by evidence and after exhaustion of his administrative remedies.

I. BACKGROUND

In 2015, Defendant pled guilty to one count of conspiracy to distribute, possess with intent to distribute and manufacture methamphetamine and possession of a firearm in furtherance of a drug trafficking crime. (Doc. No. 85). He was sentenced to 120 months plus four years of supervised release. (Doc. No. 131).

Defendant is a 38-year-old male confined at FMC Fort Worth, an administrative-security federal prison for male inmates with medical needs in Texas, with a projected release date of December 3, 2023. Defendant seeks a reduction in his sentence under the compassionate release statute, 18 U.S.C. § 3582(c)(1)(A). He claims his pre-existing underlying medical illness makes him vulnerable to COVID-19. According to his Presentence Report, as a child he suffered from

seizures, which stopped around age 10. He stated that he had a seizure in 2009 but none since. (Doc. No. 111, ¶ 68). With Defendant's prior motion for compassionate release, he claimed he suffers from hypertension, a seizure disorder, and chronic asthma. (Doc. No. 172, at 4). According to medical records submitted with this motion for compassionate release, Defendant has hypertension, periodontitis and depression with no significant allergies and seizures noted as in remission. (Doc. No. 176, Pages 6-12).

II. COMPASSIONATE RELEASE

A prisoner may bring a motion for compassionate release before the court only if he “has fully exhausted all administrative rights to appeal a failure” of the BOP to bring a motion on his behalf or if 30 days have passed since the warden received his request, “whichever is earlier.” 18 U.S.C. § 3582(c)(1)(A). Courts are split over whether the exhaustion requirement is jurisdictional or is a “case processing” rule that can be waived. *Compare United States v. Brown*, No. CR 12-20066-37-KHV, 2020 WL 1935053, at *1 (D. Kan. Apr. 22, 2020) (“The requirement to exhaust administrative remedies or wait 30 days after the warden receives a request is jurisdictional.”) *with United States v. Alam*, -- F.3d --, No. 20-1298, 2020 WL 2845694, at *2 (6th Cir. June 2, 2020) (holding that the administrative exhaustion requirement in 18 U.S.C. § 3582(c)(1)(A) is non-jurisdictional). The majority view is that the exhaustion requirement is a case processing rule. *See, e.g., United States v. Smith*, No. 12 Cr. 133 (JFK), 2020 WL 1849748, at *2-3 (S.D.N.Y. Apr. 13, 2020) (collecting cases).

If the rule is not jurisdictional, then it can be waived, forfeited, or abandoned, and is otherwise subject to exceptions. *See United States v. Zukerman*, 16 Cr. 194 (AT), 2020 WL 1659880, at *3 (S.D.N.Y. Apr. 3, 2020); *United States v. Russo*, No. 16-cr-441 (LJL), 2020 WL 1862294, at *5 (S.D.N.Y. Apr. 14, 2020). These exceptions include “where it would be futile, either because the

agency decisionmakers are biased or because the agency has already determined the issue, . . . where the administrative process would be incapable of granting adequate relief, . . . [or] where pursuing agency review would subject plaintiffs to undue prejudice.” *Zukerman*, 2020 WL 1659880, at *3 (citing *Washington v. Barr*, 925 F.3d 109, 118-19 (2d Cir. 2019)). It is Defendant’s burden to show that he has exhausted his remedies or that exhaustion would be futile or result in undue prejudice. *See, e.g., United States v. Bolino*, No. 06-cr-0806(BMC), 2020 WL 32461, at *1 (E.D.N.Y. Jan. 2, 2020) (requiring defendant to prove that the exhaustion requirement has been met).

Here, Defendant has not exhausted his remedies as required under 18 U.S.C. § 3852(c)(1)(A). While he attaches a denial of his request for compassionate release from the warden dated July 21, 2020, he has not exhausted all administrative appeals of the warden’s adverse decision that are available to him within the BOP. The denial letter from the warden states that Defendant has 20 days to appeal the warden’s decision to the Regional Director, Bureau of Prisons at the South Central Regional Office.

According to the BOP’s website, FMC Fort Worth currently has 9 inmates and 8 staff with confirmed active cases of COVID-19. There are approximately 1,500 inmates at FMC Fort Worth. There have been 12 inmate deaths while 577 inmates have recovered and 6 staff have recovered. Given this information, the Court finds that Defendant has not met his burden of showing that the exhaustion requirement in 18 U.S.C. § 3582(c)(1)(A) should be excused. With so few current cases amongst the inmate population at FMC Fort Worth, requiring Defendant to exhaust his administrative remedies within the BOP before petitioning this Court would not result in any “catastrophic health consequences” or unduly prejudice Defendant. *See United States v. Fraction*, No. 3:14-CR-305, 2020 WL 3432670, at *7 (M.D. Pa. June 23, 2020) (finding the defendant did

“not demonstrate any ‘catastrophic health consequences’ to make exhaustion futile or show that he could be unduly prejudiced if he had to wait to exhaust his administrative remedies with the BOP”). Generalized concerns regarding the possible spread of COVID-19 among the inmate population at FMC Forth Worth are not enough for this Court to excuse the exhaustion requirement, especially considering the BOP’s statutory role, and its extensive and professional efforts to curtail the virus’s spread at FMC Fort Worth. *See United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020).

III. APPOINTMENT OF COUNSEL

Defendant also moves for appointment of counsel to assist him with his compassionate release motion. (Doc. No. 175). There is no general constitutional right to appointed counsel in post-conviction proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *United States v. Williamson*, 706 F.3d 405, 416 (4th Cir. 2013). The Court has discretion to appoint counsel in proceedings under 18 U.S.C. § 3582(c) if the interests of justice so require. *See United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000); *see also United States v. Reed*, 482 F. App’x 785, 786 (4th Cir. 2012); *cf.* 18 U.S.C. § 3006A (providing the interests of justice standard for appointment of counsel in similar post-conviction proceedings).

Defendant is seeking compassionate release due to risks associated with the COVID-19 pandemic that allegedly place him at greater risk of complications if he contracts the virus. Defendant, however, is capable of requesting compassionate release on this basis without the assistance of counsel, and Defendant has not otherwise established that the interests of justice

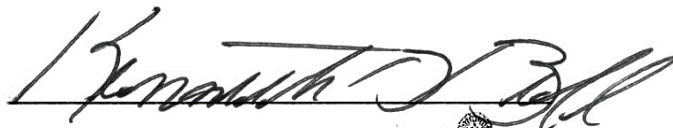
require appointment of counsel in these circumstances at this time. Accordingly, the Court will deny the motion to the extent Defendant seeks appointment of counsel.¹

IV. ORDER

IT IS THEREFORE ORDERED that Defendant's motion for compassionate release, (Doc. No. 175), is **DENIED** without prejudice to a renewed motion properly supported by evidence and after exhaustion of his administrative remedies.

SO ORDERED.

Signed: August 7, 2020



Kenneth D. Bell
United States District Judge



¹ A number of courts have denied a motion for appointment of counsel as moot where the motion for compassionate release is denied due to the inmate's failure to exhaust his administrative remedies. *See, e.g., United States v. Tutt*, No. 6:17-CR-040-CHB-1, 2020 WL 2573462, at *2 (E.D. Ky. May 21, 2020); *United States v. Bolze*, No. 3:09-CR-93-TAV-CCS-1, -- F. Supp. 3d --, 2020 WL 2521273, at *9 (E.D. Tenn. May 13, 2020); *United States v. Woolum*, No. 5:84-CR-21-TBR, 2020 WL 1963787, at *2 (W.D. Ky. Apr. 23, 2020).